APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1964 — APRIL SESSION, 1965

No. 14507
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-vs-
PETER DIFRONZO and
MEDO CALZAVARA,
Defendants-Appellants.

No. 14508
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-vs-
ANTHONY DADDINO,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

April 29, 1965

Before HASTINGS, *Chief Judge,* CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge* — The defendants, Peter DiFronzo, Medo Calzavara, and Anthony Daddino, were convicted, after a jury trial, on both counts of a two-count indictment which charged the interstate transportation of

merchandise known to have been stolen, and conspiracy to so transport such merchandise, in violation of 18 U.S.C.A. § 2314 and § 371, respectively. Each was sentenced to a term of ten years on the substantive count and to a term of five years on the conspiracy count, the sentences to run concurrently.

Without reciting the evidence in detail it is sufficient for the purpose of the issues presented by the defendants' appeals to observe that the record reveals that on April 29, 1961, certain trailers containing a large quantity of cigarettes, razor blades, and hosiery were stolen from the premises of a grocery warehouse in Forest View, Illinois, and during the next few days there was concerted action on the part of the defendants in the transportation of the stolen merchandise. On the morning following the robbery the stolen merchandise was brought to the farm premises of the defendant Calzavara, near Grayslake, Illinois, and placed in a barn. Portions of the merchandise were thereafter transported to other locations, including one in Wisconsin.

On appeal all of the defendants contend the District Court erred in permitting the jury to separate after it had commenced its deliberation. But the record discloses that the trial court counsel for each of the defendants agreed to the procedure outlined and followed by the trial judge in this respect.[1] The defendants are in no position to claim error in this connection.

Defendants DiFronzo and Daddino urge that the trial court erred in overruling their respective motions for a severance. Such motions were made toward the conclusion of the trial after counsel for Calzavara during the cross

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[1] Moreover, there is no claim that the separation actually resulted in anything prejudicial to any of the defendants.

examination of a government witness elicited from the witness that Calzavara had told him that Calzavara's participation in the events involving the transportation of the stolen merchandise was produced by threats against his life by persons not identified. But the fact that a co-defendant states that his participation was caused by threats by a person or persons unknown and unidentified is not a basis for a severance. It evidences no demonstrable prejudice to any of the other co-defendants.

DiFronzo additionally urges that the evidence is insufficient to support his conviction on either count. From our examination of the record, and we must view the evidence and the reasonable inferences which may be drawn therefrom in the light most favorable to the government (*Glasser* v. *United States,* 315 U.S. 60, 80), we are satisfied that the evidence warrants the conclusion, implicit in the jury's verdict, that DiFronzo participated in both the substantive and the conspiratorial offenses.

Daddino makes the further contention that the court erred in declaring a mistrial and subsequently denying his plea in bar asserting former jeopardy. The trial commenced on September 12, 1963. On September 13, 1963, after three government witnesses had testified, and the fourth was on the stand, the noon recess was taken. An altercation took place between the prosecutor and counsel for one of the defendants. It involved the attempt of the prosecutor to regain possession of material tendered to defense counsel pursuant to a Section 3500[2] request. Eight of the jurors witnessed the episode. Defendant Calzavara moved for a mistrial based on the incident. The court interrogated the jurors, individually, *in camera.* Although the court's "ultimate impression" was that the episode

[2] 18 U. S. C. A. § 3500.

would not in fact influence the jurors he concluded that from the point of view of all concerned it would be better to proceed to try the case before another jury. Accordingly, he withdrew a juror and declared a mistrial. Daddino had not joined in the motion for a mistrial but he made no objection thereto. No inquiry was made as to the position of Daddino in the matter. The trial at which the convictions resulted commenced after Daddino's plea of former jeopardy was denied.

It is evident from the record that the concern of the trial judge was to secure for the defendants a fair trial before an impartial jury unaffected by whatever reaction, conscious or unconscious, the incident might have engendered in the minds of the jurors who witnessed it. The rationale of *Gori* v. *United States*, 367 U.S. 364, 368, is applicable here. It was there pointed out:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. *Simmons* v. *United States*, 142 U.S. 148; *Logan* v. *United States*, 144 U.S. 263; *Dreyer* v. *Illinois*, 187 U.S. 71, 85-86. It is also clear that 'This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served . . . ,' *Brock* v. *North Carolina*, 344 U.S. 424, 427, and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion."

The admonitions expressed in *Downum* v. *United States*, 372 U.S. 734, relied upon by the defendant, do not in our judgment serve to invalidate the teaching of *Gori*. See

United States v. *Tateo*, 377 U.S. 463, 467. We perceive no basis in the instant case upon which to attribute error to what appears to be an informed exercise of discretion on the part of the trial judge.

Calzavara contends that the District Court erred in not dismissing the indictment as to him on the grounds that it is identical to a prior indictment which was returned by a federal grand jury in Milwaukee, Wisconsin, but was dismissed on the ground that the defendant was not advised of certain of his constitutional rights before testifying, pursuant to subpoena, before that grand jury. The basis for the dismissal of the previous indictment is fully set forth in *United States* v. *DiGrazia* (D.C. N.D. Ill.) 213 F. Supp. 232, and it was there observed (p. 233) that:

> " . . . it is clear from an examination of his [Calzavara's] testimony . . . that no direct incriminating statements of fact were made by him."

The denial of the defendant Calzavara's motion to dismiss the subsequent indictment is supported by *Lawn* v. *United States*, 355 U.S. 339, 348-350, and *Costello* v. *United States*, 350 U.S. 359, 363. The government's response to the motion unequivocally stated that no testimony was wrongfully, unlawfully or illegally obtained from Calzavara at any time. Such an avowal is a sufficient basis for the denial of a motion to dismiss predicated upon alleged use of illegal testimony before the grand jury. *Lawn* v. *United States, supra.* And, the court cannot inquire into the sufficiency of the evidence actually presented. *Tinkoff* v. *United States*, 7 Cir., 86 F. 2d 868, 877.

Calzavara predicates error on the District Court's rulings sustaining objections to his testifying concerning the content of conversations in which persons unknown to and unidentifiable by the witness are alleged to have threat-

oned him with violence or death unless he participated in the acts about which he testified. He argues that he was entitled to establish in such manner that his participation in the offenses charged was the product of coercion and compulsion. Such self-serving statements proffered by the defendant are not admissible. And, in a somewhat analogous situation this Court has held that the statements of unidentified persons do not qualify as *res gestae*. *United States* v. *Konovsky*, 7 Cir., 202 F. 2d 721, 728. Moreover, the record here is not such that the excluded testimony could have established a situation warranting a jury finding of coercion, compulsion or duress. There was nothing proved or proffered to show a compulsion "present, immediate and impending, and of such nature as to induce a well founded fear of death or at least serious bodily injury" accompanied by "no reasonable opportunity to escape the compulsion without committing the crime". *R. I. Recreation Center, Inc.* v. *Aetna Casualty & Surety Co.*, 1 Cir., 177 F. 2d 603, 605. See also *D'Aquino* v. *United States*, 9 Cir., 192 F. 2d 338, reh. den. 203 F. 2d 390.

Calzavara assails the instruction given by the court concerning compulsion or duress as a defense. But the claimed error was not urged in the trial court and is therefore deemed waived. *United States* v. *Furlong*, 7 Cir., 194 F. 2d 1, 3.

We have considered, but find without merit, Calzavara's contention that the court erred in failing to suppress evidence concerning the discovery of part of the stolen merchandise on the farm of his brother, Oscar Calzavara. The defendant had given information in this connection to FBI agents in Milwaukee following his grand jury appearance there. The court found, pursuant to a hearing, that the defendant was adequately and sufficiently informed of

his constitutional rights on that occasion. And, his belated contention, not urged below, that he furnished the information in exchange for a promise of lenity, may not be raised for the first time on appeal. *On Lee* v. *United States*, 343 U.S. 747, 749, 750, fn. 3; *United States* v. *Furlong*, 7 Cir., 194 F. 2d 1.

The judgment orders of the District Court are affirmed.

AFFIRMED

No. 14507.

SWYGERT, *Circuit Judge*, dissenting in part.

I must disagree with the majority's holding that the evidence was sufficient to sustain DiFronzo's conviction. An examination of the record shows a complete absence of evidence to support a verdict against this defendant either as an aider and abettor in the interstate transportation of stolen property or as a co-conspirator in such conduct.

The only evidence that might remotely relate DiFronzo to the violations of which he was found guilty is testimony to the effect that at one time he was seen riding in a Pontiac automobile which at a later time was found to be following the truck making the interstate transportation of the stolen goods. DiFronzo was not in the automobile at the time it was observed to be following the truck from Illinois to Wisconsin. Rather, he was found in another truck transporting stolen goods from one point in Illinois to another place in the same state. Moreover, there was no showing that DiFronzo owned the Pontiac or had any participation in its use interstate.

The Government has been unable to point to any evidence which might link DiFronzo with the interstate offenses charged. His actions tended to show a participation only in an intrastate transportation of stolen items. There is no evidence to show that he conspired in planning the interstate activity or that he aided and abetted in the conduct thereof. Although his activity might well warrant a conviction in a state criminal proceeding, it is not a proper basis for prosecution under the federal statutes. Accordingly, the evidence fails to sustain the verdict against this defendant.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

Thursday, May 27, 1965

BEFORE:

HONORABLE LUTHER M. SWYGERT, *Circuit Judge*
HONORABLE JOHN S. HASTINGS, *Chief Judge*
HONORABLE LATHAM CASTLE, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* -vs- PETER DIFRONZO, MEDO CALZAVARA, ANTHONY DADDINO, *Defendants-Appellants.* Nos. 14507-08	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

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IT IS FURTHER ORDERED that the petitions for rehearing, filed by each of the defendants-appellants in these appeals, be and the same are hereby denied.

APPENDIX "C"

UNITED STATES of America,
Plaintiff,

-vs-

Phillip Joseph DiGRAZIA, Peter James Gushi, Anthony Francis Daddino, John J. Torello, Medo Calzavara, Rose Calzavara and Peter DiFronzo, *Defendants.*

No. 62 CR 16

United States District Court
N. D. Illinois, E. D.
Jan. 25, 1963

WILL, District Judge.

Defendants Rose and Medo Calzavara have moved to quash the indictment in the present cause as it relates to them. The motion is based on the alleged violation of certain asserted constitutional rights in connection with their separate appearances before a Federal Grand Jury in May, 1961.

At an oral hearing in this Court pursuant to the motion, testimony was taken of both Rose and Medo Calzavara and of the F.B.I. agents and Assistant U. S. Attorney Matthew M. Corry who participated in the investigation of the case and the presentment before the Grand Jury in Milwaukee, Wisconsin. The record of this hearing as well as the opposing briefs, the affidavits of the Calzavaras and the transcript of Medo Calzavara's Grand Jury appearance are now before the Court. They disclose the following relevant information.

Medo Calzavara was subpoenaed to appear before the Federal Grand Jury for the Eastern District of Wisconsin at Milwaukee on May 16, 1962, and did so appear and testify. The Grand Jury had been convened to consider charges arising under 18 U.S.C.A. § 2314 involving the alleged transportation in interstate commerce of certain stolen merchandise. Calzavara's testimony there related to this matter, although he was not then a named defendant. He was subsequently indicted, however, and charged with violating and conspiring to violate the foregoing statute. Rose Calzavara was also subpoenaed to appear before that panel on May 16, but she was not actually called to testify until May 26. At that time, acting on the advice of counsel, she repeatedly invoked her privilege against self-incrimination. She, too, was subsequently indicted and charged with violating and conspiring to violate 18 U.S.C.A. § 2314.

With respect to Medo Calzavara, at the time of his Grand Jury appearance he had not, as the Assistant U. S. Attorney knew, retained counsel. He was not advised of his right to consult counsel before testifying, nor was he advised either prior to or during that proceeding of his right not to answer any question which might tend to incriminate him or that anything he said might be used against him.[1] Accordingly, it is urged on his behalf that this failure to warn, at a time when he was allegedly earmarked as a "putative defendant", is sufficient, by itself, to vitiate the ensuing indictment. For its part, the Govern-

[1] Matthew Corry, the Assistant U. S. Attorney who conducted the interrogation of Medo Calzavara before the Grand Jury, testified at the oral hearing in this Court that he did not warn Calzavara of his privilege against self-incrimination because at the time of his Grand Jury appearance he consdered him a Government witness, not a prospective defendant although a possible one. Calzavara also testified that he was not warned, and the Grand Jury transcript evidences no warning.

ment argues that no such warning was required since Calzavara was called to testify as its witness, not as a defendant or prospective defendant, citing *United States v. Scully,* 2 Cir. 1955, 225 F. 2d 113, cert. denied 350 U.S. 897, 76 S. Ct. 156, 100 L. Ed. 788 (1955) and *United States* v. *Parker,* 7 Cir., 1957, 244 F. 2d 943, cert. denied 355 U.S. 836, 78 S. Ct. 61, 2 L. Ed. 2d 48 (1957). The Government further contends that it was not until after his Grand Jury testimony that information was uncovered which sufficiently linked him with the matter under investigation to warrant the return of an indictment as to him.

In their arguments, both sides make much of the appropriate label to be placed on Medo Calzavara at the time of his appearance before the Grand Jury — witness, possible defendant, prospective defendant, putative defendant, named defendant — as though the proper characterization would somehow provide a convenient solution to the problem which the motion raises. This analysis, while it may contribute to the solution, appears to miss the mark. The real question, it seems to me, ought to be whether, in the absence of a warning, Medo Calzavara may have tended to incriminate himself by his testimony before the Grand Jury. If so, the indictment must be quashed, for it would violate the constitutional precept embodied in the Fifth Amendment's privilege against self-incrimination, and all the Government's most self-serving characterizations of Calzavara's status could not save it in the face of this. Nor could it be saved by the subsequent discovery of independent information warranting his indictment.

This, of course, forces the Government to determine when a warning is appropriate. But, after all, it is not an unreasonable burden, especially since the U. S. Attorney or his assistant is in a good position to know what testimony can be expected. If the Government chooses to call

a witness before the Grand Jury who is or may be a defendant, its own self-interest as well as a proper regard for constitutional due process would seem to dictate the issuance of a warning and the securing of an immunity waiver. The risk it runs in failing to warn is a quashed indictment. In order to avoid this contingency, the fair and wise practice would seem to call for a warning and the securing of an immunity waiver whenever it is even remotely possible that the testimony of a witness might tend to incriminate him. See *United States* v. *Scully, supra.*

Turning then to Calzavara's Grand Jury appearance, it is clear from an examination of his testimony there that no direct incriminating statements of fact were made by him. He was treated as a witness who had information of events about which the Government was desirous of apprising the Grand Jury, and the questions by the Assistant U. S. Attorney and Calzavara's answers thereto followed this tack. It is apparent from the transcript that the Assistant U. S. Attorney did not get the kind of answers he wanted. Indeed, at the oral hearing in this Court, Calzavara stated that after his Grand Jury appearance " • • • Mr. Corry got awful mad at me. He says, 'How long did it take you to think up that cute story you told the Grand Jury?' And I said, 'What do you mean? Ask Mr. McCormick (F.B.I. agent) if that isn't the truth.' "

[1] While an examination of Medo Calzavara's Grand Jury testimony reveals no direct incriminating statement, there is no way to know whether in fact his appearance was incriminating in the minds of some or all the members of the Grand Jury. Certainly on the record before me, I cannot say that his testimony might not have tended to incriminate him. The only portion of the Grand Jury proceedings for which a transcript is available is Calzavara's testimony. What the U. S. Attorney or Assistant U. S. Attorney said to the Grand Jury subsequently concerning

this testimony, what incriminating inferences they drew from it, how they characterized it as to truth or accuracy, etc. are all unknown.

Whether constitutional rights have been respected should not be the subject of speculation. Where, as here, there is doubt, the only proper action is to dismiss the indictment.

While the foregoing disposes of Medo Calzavara's motion, there is inherent in this situation a broad general question which merits further consideration. In this particular case, a Grand Jury transcript is available only with respect to the testimony of one witness. I understand that the practice varies from district to district and even within districts, but that in many districts the usual procedure is not to make a stenographic record, much less to transcribe the testimony, of most witnesses before the Grand Jury. In view of the importance of the Grand Jury proceedings and the several circumstances in which reference thereto is necessary, the failure to make at least a stenographic record which can be transcribed, if needed, seems most unfortunate and obviously creates opportunity for mischief.

Moreover, even where there is a transcript of the testimony before the Grand Jury, it may, as in this case, be difficult or impossible to determine whether that testimony was self-incriminating. Under all the circumstances, it would seem desirable to establish the rule that, except as to perjury indictments arising out of testimony before the Grand Jury, no individual who is not warned of his privilege against self-incrimination and executes a formal immunity waiver either upon advice of counsel or after declining such advice, may subsequently be indicted for an offense about which he was questioned before the Grand Jury. This rule would impose no greater burden on the Government than the Constitution and the law contem-

plate. It would merely regularize what is at present a loose and haphazard procedure.

With respect to Rose Calzavara, it is conceded that she gave no incriminating testimony before the Grand Jury. She contends, however, that the Assistant U. S. Attorney, by the form and manner of his questioning, prejudiced her in the eyes of that panel, thereby inducing the return of the indictment.

[2] As previously indicated, there is no transcript of Rose Calzavara's testimony. She avers that after the Assistant U. S. Attorney had been advised of her intention to rely on her Constitutional privilege and not to testify, he nevertheless brought her before the Grand Jury and asked her certain questions, including the following:

"Q. Are you married?
"Q. To whom are you married?
"Q. You have a son, don't you?
"Q. Do you love your son?
"Q. Why are you ashamed to answer questions about your son?
"Q. Who is the father of your child?
"Q. What right have you to refuse my questions? I'll bring you before the Judge and require you to answer my questions.
"Q. What is the Fifth Amendment? Do you know what it means?
"Q. Are you an American citizen?"

The Assistant U. S. Attorney testified in this Court that he remembered asking some of the foregoing questions, did not remember asking all of them, but conceded that he might have asked them. While some of these questions are not prejudicial and might properly be asked in testing the validity of the witness' reliance on her constitutional privilege, others are clearly prejudicial and could only

be calculated to discredit and impugn her in the eyes of the jurors.

Again, as in the case of Medo, there is no way of knowing on what basis the Grand Jury returned the indictment against Rose Calzavara. In fact, absent any record of the proceedings, there is no way to ascertain accurately whether any other evidence at all involving her was presented. But even assuming the presentation of other evidence which, in itself, would have warranted the indictment, it must necessarily be pure speculation as to whether that evidence or the prejudicial conduct of the prosecutor or both prompted the Grand Jury's action.

[3] The Grand Jury exists as an integral part of Anglo-American jurisprudence for the express purpose of assuring that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the government or private persons. *United States* v. *Wells,* D.C.D. Idaho 1908, 163 F. 313, 324. In this regard, it is well to remember Mr. Justice Brandeis' admonition that "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States,* 277 U.S. 438, 479, 48 S. Ct. 564, 572, 72 L. Ed. 944 (1928) (dissenting opinion). It is the duty of a prosecutor presenting a case to a Grand Jury not to inflame or otherwise improperly influence the jurors against any person. Even the presence of the prosecutor while the jurors are deliberating their action, though he say nothing, may be grounds for quashing the indictment. *United States* v. *Wells, supra.*

These principles are so well grounded in our jurisprudence as not to require elaboration. Their application here leaves me no alternative but to dismiss the indictment against Rose Calzavara as well.

Accordingly, the indictment as to both Rose and Medo Calzavara is dismissed.

APPENDIX "D"

Sec. 371, Title 18, U. S. Code:

"If two or more persons conspire . . . to commit any offense against the United States . . . and any one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Sec. 2314, Title 18, U. S. Code:

"Whoever transports in interstate . . . commerce, any goods wares, merchandise . . . of the value of $5,000.00 or more knowing the same to have been stolen . . . shall be fined not more than $10,000.00 or imprisoned not more than 10 years or both."